

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35456

STATE OF IDAHO,)	2009 Unpublished Opinion No. 631
)	
Plaintiff-Respondent,)	Filed: October 9, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
SHERYL BROWN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bingham County. Hon. Darren B. Simpson, District Judge.

Restitution order, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Sheryl Brown appeals from the district court's order to pay restitution. We affirm.

I.

BACKGROUND

Pursuant to a plea agreement and subsequently as a term and condition of her probation, Brown agreed to pay restitution for the check underlying the count of forgery to which she pled guilty as well as the checks and transactions underlying sixteen other counts that were dismissed. The amount of restitution was to be determined by the court and Brown reserved the right to object to the actual amount of restitution. The district court directed the state to submit a request for restitution within sixty days from the date of sentencing. However, the state waited more than seven months to file the request. In the meantime, the victims in this case had already begun to pursue a civil remedy to obtain restitution for the acts of forgery that were the basis of the state's restitution request. Brown objected to the state's request for restitution because it was

not filed within the sixty days. The state's explanation for the late filing was that the prosecutor's office was short-staffed and the matter had been overlooked due to a turnover of employees. The district court determined that it would be unfair to punish the victims because of the state's untimely filing and allowed the state to proceed with its request. Brown was ordered to pay restitution to her former employer and his insurer in the amount of \$7,845.16. Brown appeals the order of restitution.

II. DISCUSSION

Brown asserts that the district court erred by ordering her to pay restitution because the state's motion for restitution was filed more than seven months after the date of sentencing. The decision whether to require restitution is committed to the trial court's discretion, whose findings of fact will not be disturbed if supported by substantial evidence. *State v. Schultz*, ___ Idaho ___, ___ P.3d ___ (Ct. App. 2008); *State v. Smith*, 144 Idaho 687, 692, 169 P.3d 275, 280 (Ct. App. 2007). Orders for the payment of restitution to crime victims are governed by Idaho Code § 19-5304. *State v. Gonzales*, 144 Idaho 775, 777, 171 P.3d 266, 268 (Ct. App. 2007). Therefore, the trial court's exercise of discretion in requiring restitution must be within the boundaries provided in I.C. § 19-5304. *Schultz*, ___ Idaho ___, ___ P.3d ___; *State v. Cheeney*, 144 Idaho 294, 296, 160 P.3d 451, 453 (Ct. App. 2007). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). An abuse of discretion may be shown if the order of restitution, or refusal to issue an order of restitution, was the result of arbitrary action rather than logical application of proper factors as set out by I.C. § 19-5304(7). *In re Doe*, 146 Idaho 277, 283, 192 P.3d 1101, 1107 (Ct. App. 2008); *see also State v. Bybee*, 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct. App. 1989).

Idaho Code § 19-5304(2) provides that, unless it determines restitution would be inappropriate or undesirable, a court shall order a defendant found guilty of any crime that results in economic loss to the victim to make restitution to that victim, as guided by the factors set forth in I.C. § 19-5304(7). Those factors include consideration of the amount of economic loss

sustained by the victim as a result of the offense, the financial resources, needs and earning ability of the defendant, and other factors deemed appropriate by the court. *Doe*, 146 Idaho at 283, 192 P.3d at 1107; *State v. Hamilton*, 129 Idaho 938, 942, 935 P.2d 201, 205 (Ct. App. 1997); *Bybee*, 115 Idaho at 543, 768 P.2d at 806.

The restitution statute evidences a policy favoring full compensation to crime victims who suffer economic loss. *Doe*, 146 Idaho at 283, 192 P.3d at 1107; *Smith*, 144 Idaho at 692, 169 P.3d at 280. One of the purposes of restitution is to obviate the need for victims to incur the cost and inconvenience of a separate civil action in order to gain compensation for their losses. *Schultz*, ___ Idaho ___, ___ P.3d ___; *State v. Parker*, 143 Idaho 165, 167, 139 P.3d 767, 769 (Ct. App. 2006); *State v. Waidelech*, 140 Idaho 622, 624, 97 P.3d 489, 491 (Ct. App. 2004). Restitution orders also operate for the benefit of the state, in part because they promote the rehabilitative and deterrent purposes of the criminal law. *Doe*, 146 Idaho at 283, 192 P.3d at 1107; *State v. Olpin*, 140 Idaho 377, 378, 93 P.3d 708, 709 (Ct. App. 2004).

Idaho Code provides that “[r]estitution orders shall be entered by the court at the time of sentencing *or such later date as deemed necessary by the court.*” I.C. § 19-5304(6) (emphasis added). Brown contends that the district court abused its discretion by allowing the state to proceed on its late motion for restitution. We exercise free review over the application and construction of statutes. *Doe*, 146 Idaho at 284, 192 P.3d at 1108; *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Idaho Code § 19-5304(6) contemplates that the court may need to grant the prosecution a *reasonable* amount of time *necessary* to gather information so as to locate all victims and correctly compute the amount of restitution. *State v. Ferguson*, 138 Idaho 659, 662, 67 P.3d 1271, 1274 (Ct. App. 2002). In essence, the statute gives the court the discretion to order restitution within a reasonable time frame as the circumstances of the case necessitate.

In allowing the state to proceed on its late motion for restitution, the district court relied on *State v. Dorsey*, 126 Idaho 659, 889 P.2d 93 (Ct. App. 1995). In that case, Dorsey challenged the authority of the district court to enter an order of restitution upon application by the prosecutor nearly two years after Dorsey was placed on probation. Dorsey had accepted a plea agreement which provided that he would pay restitution. This was also made a term and condition of his probation, in which the prosecutor was given thirty days to submit the amounts due. However, the district court entered an order for restitution upon an application of the

prosecutor filed nearly two years after Dorsey was placed on probation. The prosecutor's explanation for the delay was that it took longer than anticipated to coordinate with law enforcement, and due to an oversight, a copy of the letter requesting restitution was not provided to the court or the probation department.

On appeal, this Court held that because the district court had ordered Dorsey to pay restitution in the order placing him on probation, establishing the amount owed was a matter of completing the original order, and well within the authority the court had for modifying the terms and conditions of probation pursuant to I.C. § 20-221.¹ *Dorsey*, 126 Idaho at 661, 889 P.2d at 95. The Court reasoned that the subsequent restitution order modified the original one. When restitution was initially ordered, the district court had not limited the state's recovery of restitution on compliance with the thirty-day submission deadline, nor had it imposed any sanctions for noncompliance. Consequently, the prosecutor's failure to comply with the thirty-day time frame did not preclude the district court from further exercising its discretion with regard to the order to pay restitution. Therefore, the action of the district court was held not to be an abuse of its discretionary authority. *Id.*

Brown asserts that this case is distinguishable from *Dorsey* because the victims in this case sought restitution through a civil action and did not rely exclusively on the criminal procedures for seeking restitution for their economic losses. The restitution statute specifically states that an order of restitution will not preclude the victim from seeking any other legal remedy. I.C. § 19-5304(11). It does not bar victims from bringing their own civil actions or force victims to choose between a separate civil action and the state requesting restitution on their behalf, but protects those victims who choose not to incur the costs and inconvenience of a separate action. By having the option to bring a civil action, victims are able to enforce their agreement in a civil suit if they opt to, while having the benefit of the state bringing an action on their behalf as well. If Brown is concerned about having to pay restitution twice, she need not be. The law forbids double recovery. *See Moon v. Brewer*, 89 Idaho 59, 62-63, 402 P.2d 973, 975 (1965). Any amount paid in one action will be applied to the other.

Contrary to Brown's assertion, the instant case falls squarely within *Dorsey*. As an express term and condition of her probation, Brown agreed to pay restitution to be determined by

¹ Idaho Code § 20-221 provides that "[b]y order duly entered the court may impose and may at any time modify any conditions of probation or suspension of sentence."

the court on all counts of forgery, including the dismissed ones. Although the district court directed the state to submit a request for restitution within sixty days, the order did not limit recovery to the sixty-day period, nor did it impose sanctions for noncompliance by the prosecutor. If any distinction can be made between this case and *Dorsey*, it is that the time period between the order for restitution and the request for restitution is much shorter than it was in *Dorsey*. The request for restitution here was filed nearly seven months after sentencing while the request for restitution in *Dorsey* was filed nearly two years after Dorsey was placed on probation.

Lastly, Brown asserts that she was prejudiced by the delay because by the time of the hearing, she was unable to remember the nature of some of the checks. After the first restitution hearing in which the district court issued its opinion regarding the timeliness of the original restitution request of \$7,845.16, two more restitution hearings were held. At the second hearing, the district court became aware for the first time of an additional request for restitution in the amount of \$1,816.50 being sought for another victim. Because Brown was not present at the second hearing, a third hearing was held where Brown was able to dispute the nature of some of the checks. Brown asserts that some of the checks were loans made to her, but that given the length of time that had passed since the checks were issued, she was not certain which checks were forged and which were loans. She also asserts that if the restitution hearing had been earlier she would likely have been able to remember the nature of the checks. However, even Brown's attorney stated that Brown would not necessarily be prejudiced by the seven-month delay, but that it could make it more difficult. The district court ordered Brown to pay restitution in the amount of \$7,845.16, finding that the seven-month lapse in time before the request for restitution was submitted was not prejudicial. With regard to the additional \$1,816.50 requested by the state, the district court determined it was untimely as Brown had no notice of it until eleven months after her sentencing and did not order her to pay it. The district court did take the time lapse into account when it determined that eleven months was too long and would possibly be prejudicial to Brown. Therefore, it was not an abuse of discretion for the district court to determine that the seven-month delay for restitution in the amount of \$7,845.16 was not prejudicial to Brown.

III.
CONCLUSION

The district court did not err by granting the state's request for Brown to pay restitution to her former employer and his insurer. The district court acted within its discretion when it accepted the request for restitution at a date it deemed reasonable and necessary pursuant to I.C. § 19-5304. Accordingly, the district court's order of restitution is affirmed.

Judge PERRY and Judge GRATTON **CONCUR.**